IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
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No. 71-156

UNITED STATES *ex rel.* OTIS CHESTNUT, MICHAEL BROWN, STEPHEN MARTINOT, ELLEN SHALLIT and LEVI LAUB,
Petitioners,

v.

CRIMINAL COURT OF THE CITY OF NEW YORK, GEORGE F. McGRATH, Commissioner of Correction of the City of New York and FRANK S. HOGAN, District Attorney of New York County,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinions	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
The Hearing Evidence Concerning the Composition of the Grand Jury	7
Summary of Argument	11
Argument—The grand jury before which the petitioners were contemptuous was lawfully impaneled without purposeful or intentional exclusion of any element of the community entitled to representation	12
The Statutory Scheme	12
Any Disproportionate Representation of Negroes, Puerto Ricans, Blue-Collar Workers and Low Income Groups Was Not Purposeful or Intentional	18
Negroes and Puerto Ricans	18
Blue-collar workers and low income groups	21
The Former Exclusion of Persons Under Thirty-five Years of Age and Persons Receiving Welfare Assistance Was a Valid Exercise of Discretion to Set Relevant Qualifications for Grand Jury Service	23
Persons under thirty-five	23
Welfare recipients	25

PAGE

The $250 Property Requirement [Former New York Judiciary Law §596(3)] Was Not Applied to the Selection of the 1964 Grand Jury 27

Conclusion 28

TABLE OF AUTHORITIES

Cases:

Beck v. Washington, 369 U.S. 541 (1962) 23, 25
Brown v. Allen, 344 U.S. 443 (1953) 20

Carter v. Greene County, 396 U.S. 320 (1970) 11, 17
Chestnut v. People of the State of New York, 370 F.2d 1 (2d Cir. 1966), cert. denied, 386 U.S. 1009 (1967) 4

Fay v. New York, 332 U.S. 261 (1947), aff'g 296 N.Y. 510 (1946) 20

Gorin v. United States, 313 F.2d 641 (1st Cir. 1963), cert. denied, 374 U.S. 829 (1963) 14

Hoyt v. Florida, 368 U.S. 57 (1961) 20

King v. United States, 346 F.2d 123 (1st Cir. 1967) 25

McManaman v. United States, 327 F.2d 21 (10th Cir. 1964), cert. denied, 377 U.S. 945 (1964) 22
Maxwell v. Turner, 411 F.2d 805 (10th Cir. 1969) 19

People v. Agron, 10 N Y 2d 130 (1961), cert. denied, 368 U.S. 922 (1961) 18
People v. Chestnut, 26 N Y 2d 481 (1970) 18, 24, 26, 27
People v. Dessaure, 299 N.Y. 126 (1949), cert. denied, 337 U.S. 949 (1949) 18
People v. Donohue, 20 N Y 2d 824 (1967) 22

PAGE

People v. Ferguson, 25 N Y 2d 728 (1969), citing People v. Ferguson, 55 Misc 2d 711 (Shapiro, J.) (Sup. Ct., Queens Cty. 1968) 18
People v. Horton, 18 N Y 2d 355 (1966), cert. denied, 387 U.S. 934 (1967) 18
People v. Shakur, 25 N Y 2d 705 (1969) 17

Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966) 19

Samuels v. Mackell, 288 F. Supp. 348 (S.D.N.Y. 1968) FRIENDLY, J., for 3-judge court), aff'd on other grounds, 401 U.S. 66 (1971) 27
Swain v. Alabama, 380 U.S. 202 (1965) 19

Turner v. Fouche, 396 U.S. 346 (1970) 11, 17

United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), cert. denied, 396 U.S. 852 (1962), rehearing denied, 396 U.S. 949 (1969) 18
United States v. Bowe, 360 F.2d 1, 6-7 (2d Cir. 1966), cert. denied, 385 U.S. 961 (1966) 18
United States v. Caci, 401 F.2d 664 (2d Cir. 1968), cert. denied, 394 U.S. 917 (1969) 23
United States v. Flynn, 216 F.2d 354 (2d Cir. 1954), cert. denied, 348 U.S. 909 (1955) 18, 22
United States v. Greenberg, 200 F.Supp. 382 (S.D. N.Y. 1961) 18
United States v. Hunt, 265 F.Supp. 178 (W.D. Tex. 1967), aff'd, 400 F.2d 306 (5th Cir. 1968), cert. denied, 393 U.S. 1021 (1969) 22-3
United States v. Leonetti, 291 F.Supp. 461 (S.D.N.Y. 1968) 18
United States v. Van Allen, 208 F.Supp. 331 (S.D. N.Y. 1962), modified sub nom. United States v. Kelly, 349 F. 2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966) 18

PAGE

United States ex rel. Epton v. Nenna, 318 F.Supp. 899 (S.D.N.Y. 1970), aff'd, —— F.2d —— (2d Cir. June 30, 1970) 12, 20-1, 25, 27

United States ex rel. Fein v. Deegan, 410 F.2d 13 (2d Cir. 1969), cert. denied, 395 U.S. 935 (1969) 19

Constitutional and Statutory Provisions:

New York Civil Rights Law §13 17

New York Code of Criminal Procedure §251 24

New York Constitution
Article 3, Section 17 13
Article 13, Section 13 ..... 13, 14

New York County Law §909 13

New York Judiciary Law
§591 14
§592 ..... 14, 15
§593 ..... 16, 17
§594 14
§595 16
§596 ..... 2-3, 13, 16, 17, 23, 24, 27
§598 ..... 16, 25
§599 16
§601 17
§609 ..... 14, 15, 17

New York Penal Law, former §600(6) 3, 4

28 U.S.C. §1254(1) 2

28 U.S.C. §1443(1) 3

28 U.S.C. §2254 19

PAGE

Other Authorities:

City of New York, Records of the Division of Statistics of the Bureau of Fiscal Affairs of the Department of Social Services 26

New York City Charter, §§1115, 1117-8 25

New York Judicial Council, Sixth Annual Report (1940) 15

Rules of the Jury System in the City of New York
Rule 2 16
Rule 17 16
Rule 21 15

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Opinions

The opinion of the District Court (App. B of Petition) is not reported. The opinion of the Court of Appeals for the Second Circuit (App. A of Petition) is reported at 442 F.2d 611 (1971).

Jurisdiction

The order of the Court of Appeals for the Second Circuit was entered on May 5, 1971. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Question Presented

Was the 1964 grand jury before which the petitioners were contemptuous-lawfully impaneled without purposeful or intentional exclusion of any element of the community entitled to representation?

Statute Involved

The pertinent part of New York Judiciary Law Section 596 is as follows:

"Qualifications of jurors:

"In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must:

"1. Be a citizen of the United States, and a resident of the county.

"2. Be not less than twenty-one, nor more than seventy-five years of age, provided however, that a person between seventy and seventy-five years of age shall be excused at the request of any party to the action and such request shall not constitute a peremptory challenge.

"3. Be in the possession of his natural faculties and not infirm or decrepit.

"4. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

"5. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly * * *"

Another subdivision, repealed in 1967, provided that prospective jurors had to own property valued at at least $250. Former New York Judiciary Law Section 596 (3).

Statement

The petitioners were charged by informations filed in the Criminal Court of the City of New York with criminal contempt under §600(6) of the former New York Penal Law for refusing to answer questions before a New York County grand jury investigating the Harlem riots of 1964, after having formally been offered complete immunity from prosecution. The questions, set forth in the individual informations, called for simple yes or no answers and sought, in general, to elicit whether, in July of 1964, the witnesses had met with any of the three targets of the inquiry, and if so, whether on such occasions they had heard any of the three discuss plans for making use of rifles from rooftops or other means of instigating rioting.

Prior to trial, the defendants brought a removal action [under 28 U.S.C. §1443(1)] in the United States District Court for the Southern District of New York, alleging a violation of their equal protection rights in the New York statutory scheme for selecting grand jurors. They failed in their attempt, that court (Croake, J.) finding the cases improvidently removed and remanding them to the New

York City Criminal Court. The defendants appealed, and the Court of Appeals unanimously affirmed the order, concurring in the District Court's finding. *Chestnut* v. *People of the State of New York,* 370 F.2d 1 (2d Cir. 1966). The defendants then sought certiorari, which was denied. 386 U.S. 1009 (1967).

The defendants returned to the state courts, where they were granted a full hearing on their claim—being accorded the widest latitude of exploration. Since grand juries are an arm of the Supreme Court, the hearing was held by that court in February, 1967. After the hearing, Mr. Justice MURTAGH, before whom it was held, denied the defendants' motion, upon the following opinion dated April 3, 1967:

> "After hearing, the motion is denied. 'Want of proportional representation of groups not proven to be deliberate and intentional is not constitutionally offensive.' Froessel, J. in *People* v. *Agron,* 10 N Y 2d 130, 141, citing *Fay* v. *New York,* 332 U.S. 261, 291; *Akins* v. *Texas,* 325 U.S. 398, 403." *N.Y.L.J.,* April 5, 1967, p. 18, c. 6.

The case was then returned to the Criminal Court for the trials, on which occasion the motions to dismiss were renewed.

The petitioners were convicted of CRIMINAL CONTEMPT [former New York Penal Law Section 600(6)], after consecutively conducted individual trials, by a three-judge panel (RINGEL, P.J., SHERWIN and HOFFMAN, JJ.).

The petitioner Chestnut, convicted of three counts, was sentenced to concurrent terms of four months; the petitioner Brown, convicted of two counts, was sentenced to

concurrent terms of sixty days; the petitioner Martinot, convicted of two counts, was sentenced to concurrent terms of six months; the petitioner Shallit, convicted of a single count, was sentenced to a term of thirty days; and the petitioner Laub, convicted of two counts, was sentenced to concurrent terms of six months. The judgments were entered on September 20, 1967.

The petitioners have served their sentences.

The Appellate Division, First Department, resolved some initial confusion concerning which court had jurisdiction to pass upon the Supreme Court hearing; the Appellate Division ruled that in passing upon the renewed motions in the Criminal Court, the Appellate Term was permitted to "consider" the evidence at the Supreme Court hearing. N.Y.L.J., March 15, 1968, p. 2, c. 3 (Mr. Justice McNally dissenting). The Appellate Term unanimously affirmed the judgments of conviction. N.Y.L.J., Sept. 10, 1969, p. 2, c. 2. Leave to appeal to the New York Court of Appeals was granted by Associate Judge Adrian P. Burke of that court on October 15, 1969. That court unanimously affirmed the convictions in an opinion by Chief Judge Fuld, finding that the grand jury had been constitutionally impaneled. 26 N Y 2d 481 (1970).

The petitioners sought a stay of the execution of their sentences from Judge Burke pending review by this Court. It was denied. They then sought a stay from Mr. Justice Harlan which was denied on June 23, 1970. Applications for stays before Mr. Justice Marshall and Mr. Chief Justice Burger were also denied. On July 28, the petitioners began serving their sentences. An order releasing them

pending determination of their application for habeas corpus relief was issued by Judge TYLER of the District Court, but that order was stayed by Judge ANDERSON of the Court of Appeals for the Second Circuit by a determination entered on July 31. The Court of Appeals upheld that ruling, after oral argument, by an order entered on September 18 (429 F.2d 1406). On October 5, Judge TYLER denied the writs of habeas corpus. Reargument was held on October 30, and Judge TYLER adhered to his original determination in an order dated November 4, 1970. The Court of Appeals unanimously affirmed the order on May 5, 1971 in an opinion by Circuit Judge KAUFMAN (App. A. of Petition); 442 F.2d 611.

The Court of Appeals, in discussing petitioners' due process argument, found that they had failed to show that the grand jury before which they were contemptuous "was unable to act fairly and impartially." (Petition, p. 8a). It stated further that the New York County officials had rationally concluded "that volunteer grand jurors would perform their obligations—including the duty to refuse an indictment in appropriate cases—more conscientiously than jurors suffering the considerable inconvenience of jury service pursuant to a compulsory summons." (Petition, pp. 9a-10a).

In passing on the petitioners' equal protection argument, it observed that the petitioners had conceded "the absence of purposeful discrimination" (petition, p. 12a) and had not shown how they were denied equal protection by the [former] exclusions of welfare recipients, persons younger than 35 years of age and those owning assets valued at less than $250. (Petition, pp. 13a-14a).

The Hearing Evidence Concerning the Composition of the Grand Jury

Most witnesses at the hearing were personnel who performed, or had performed, some role in the selection of grand jurors; such witnesses were: **Oliver Sutton**, former Deputy County Clerk in charge of jurors (H203-27),* **Julius Archibald**, former Deputy County Clerk of New York County (H288-326), **Harry Budin**, clerk in the Division of Jurors (H32-203, 246-72, 487-503), **Sam Rosen**, former Deputy County Clerk (H467-77), **Norman Goodman**, Clerk of the Supreme Court, New York County (H477-82), **Herbert Roystacher**, clerk in charge of Part 30 (H483-7), and **Raymond Ricketts**, I.B.M. supervisor for New York County Clerk's Office, Division of Jurors (H272-87). Also called as a witness was **Milton Adler**, an attorney with the Legal Aid Society (H462-7).

The most important elements of their testimony were the following:

There was no systematic or intentional exclusion of any person or group based on race, color, creed or national origin (H227, 266-7, 294, 476). At least one of the witnesses, a former Deputy County Clerk from 1958-65, was a Negro (H95, 320-22). Grand jurors were, and are, obtained in New York County on a strictly voluntary basis (H49, 51, 56, 60-1, 66, 109, 136, 181, 258, 262, 491). Since not enough persons affirmatively seek to perform such service, however, resort is made to the regular mailing of form letters solicit-

* Numbers in parentheses, preceded by the letter "H", refer to pages of the typewritten minutes of the Supreme Court hearing held in February, 1967.

ing it. The source of almost all the addresses to which such letters are mailed is a list obtained, with the aid of a computer, from the county's petit juror list—the computer being programmed to eliminate names of government employees and persons under 35 or over 64 years of age (H275-6, 281-2).

The age limitation of 35 was used because the clerk's office wanted a more mature person and one who had served as a petit juror (H103, 127, 161, 215, 293, 311). Persons under 35 would be considered if referred by a judge (H159, 249). In 1964, 23 of the grand jurors selected had been recommended by judges (H89-90).

Response to the letter solicitations is predictably very poor—only about one-third of the persons contacted even troubling to respond (H56, 110). Many of those responding do so only because of a mistaken initial impression that they have been effectively summoned, and are under some kind of compulsion to respond (H56). Many other proceed no further upon learning of the demands such service will make upon their time—a factor unquestionably contributing to the relatively high proportion of "retired" persons among those ultimately serving (H56, 258, 262). Indeed, even under the theoretically compulsory petit jury system, the officials summoning jurors have encountered a serious "scofflaw" problem (H136, 491-2).

The petit jury list and the record that is utilized by the Jury Clerk to solicit prospective grand juror do not reflect the race of the individual (H50). Individuals who respond favorably to the solicitation letter are requested to come to the office of the Division of Jurors of the New York

County Clerk's office to be interviewed and fingerprinted. Prior to 1965, race was indicated on the fingerprinting card, at the request of the Bureau of Identification of the Department of Correction, but this was of no consequence since the card was immediately sent to that agency in Albany (H67-70).

After the interview by the Clerk, a credit rating is taken of the prospective grand juror to determine whether there are judgments or liens outstanding against him, or if there is litigation pending against him (H76). One outstanding judgment or lien would not necessarily disqualify the prospective juror but would be used merely as evidence as to his reliability (see where Budin corrected his testimony of H104 at H128). It would depend on whether the judgment was "flagrant" (H474-5) or how many there were (H303). A former bankruptcy is treated in a similar fashion (H105, 209, 305, 474). Approximately six persons were rejected for the 1963-64 year on the basis of outstanding liens and judgments (H77-8, 82). If the applicant is a defendant in a New York divorce proceeding and the divorce had been granted, he would be rejected (H120), although at least one clerk considered the rejection to be optional (H306-7). The credit rating does not list the individual's income as being less than a stated figure; his income is never used to determine his eligibility (H85-8, 470).

The grand jury list is re-evaluated every year (H90-1, 149). The County Jury Board makes the selection of the grand jurors from the list submitted to it by the clerks (H88). The list that goes to it contained no designations of race, creed or nationality (H87-8). Of about 200 names

submitted to it, the Board rejected from 3 to 15 names each year from 1960 through 1964 (H154).

In connection with their grand jury work, one of the constant questions they had to contend with was the matter of racial and ethnic imbalance (H185). Consequently, some officials made persistent efforts to achieve a more balanced representation, especially with respect to Negroes and Puerto Ricans. For example, they contacted various Negro organizations. However, there was only limited success. Mr. Sutton succeeded in securing about a hundred potential Negro grand jurors (H181-189, 137-8, 211-13, 255-6, 258-261, 294-5, 319-20, 476). Moreover, representation of Negroes on petit juries had improved immensely from about 1961 to the present (H463-4).

Concerning the former requirement [former Judiciary Law §596(3); repealed in 1967] that a juror be the possessor of property valued at at least $250, the testimony was that since, in life of inflation, "practically the clothes on a person's back" were now worth that much, that requirement had been disregarded, at least since 1960 (H 478-9; see also H38-9, 41, 96-7, 116, 223, 316, 482, 488-9).

Upon learning that a minimum age limit of 35 had been fixed for grand jurors, the defendants amended their complaint to allege discrimination with respect, also, to the "class" of person under 35 (and over 21), and secured three witnesses to testify that such a "class" existed: **Ruth Ward**, a guidance counselor (H382-409), **Vernon Dibble**, a sociologist (H370-81), and **Bernice Neugarten**, a social science professor (H410-61).

Also called was **Max Wolff** (H342-70), a sociologist familiar with the New York Puerto Rican population, who gave testimony concerning some of its characteristics. Although called at the instance of the defendants, his chief testimony was that, like other urban lower economic groups (H360), the New York Puerto Rican community tended to be highly transient, but that, as they move "up the economic ladder" (H362), they did tend to become voters and in other respects generally to "become more active in public life" (H363).

Summary of Argument

Petitioners argue that the panel of the New York County Grand Jury before which they were contemptuous was empaneled by systematic exclusion of members of the community who were entitled to representation. The applicable New York statutes, however, on their face, are indistinguishable from state laws and procedures upheld by this Court. *Carter* v. *Greene County,* 396 U.S. 320 (1970); *Turner* v. *Fouche,* 396 U.S. 346 (1970). The grand jury was not unconstitutional because Negroes and Puerto Ricans, and blue-collar workers and persons with low incomes, were not represented in proportion to their representation in the population of New York County, the record establishing the absence of purposeful or intentional discrimination.

The requirement, later discontinued, that a grand juror be at least 35 years of age violated no federal constitutional provision. It was reasonable for local officials to infer that maturity and experience, qualities desirable in grand jurors,

would stem from application of the age limit, since persons of that age would have been more likely to have served at least twice as members of petit juries, and New York law requires grand jurors to be acquainted with standards applied by trial jurors. By the same token, the discontinued practice of not considering persons on welfare rolls for grand or petit jury service was not unconstitutional, the record showing no intent to discriminate because of indigency, but rather a good faith effort to assemble a body of grand jurors who were enabled by local law, and conditions of the grand jurors themselves, to fulfill the time-consuming and important responsibilities of serving for at least a month at a time on a grand jury. Other facts considered by the clerks were also relevant to determining the prospective grand jurors' availability for service and reliability, and raise no serious federal question. Finally, the record shows that the statutory $250 property requirement, subsequently repealed, was not applied by the clerks in this case.

ARGUMENT

The grand jury before which the petitioners were contemptuous was lawfully impaneled without purposeful or intentional exclusion of any element of the community entitled to representation.*

The Statutory Scheme

The pertinent New York statutory provisions relating to jury selection in New York County are chiefly in the New York Judiciary Law and in the New York Code of Criminal

* A similar claim raised against the same grand jury was rejected by District Judge Frankel in *United States ex rel. Epton* v. *Nenna*, 318 F. Supp. 899 (S.D.N.Y. 1970), *aff'd* —— F.2d —— (2d Cir. June 30, 1971).

Procedure. Article 13, Section 13 of the New York State Constitution provides that the county clerks in New York City "shall have the power to select, draw, summon and empanel grand and petit jurors in the manner and under the conditions now or hereafter prescribed by law"; Section 909 of the New York County Law contains an identical provision. Article 3, Section 17 of the State Constitutions prohibits the legislature from "[s]electing, drawing, summoning or impaneling grand or petit jurors" by the device of a "private or local bill."

The initial statutory qualifications for grand and petit jurors in New York County are the same. One must:

> "1. Be a citizen of the United States and a resident of the county.
>
> "2. Be not less than twenty-one, nor more than seventy-five years of age, provided however, that a person between seventy and seventy-five years of age shall be excused at the request of any party to the action and such request shall not constitute a peremptory challenge.
>
> "3. Be in the possession of his natural faculties and not infirm or decrepit.
>
> "4. Not have been convicted of a felony or a misdemeanor involving moral turpitude.
>
> "5. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly * * *." N.Y. Judiciary Law, §596.

Another subdivision, repealed in 1967, provided that prospective jurors had to own property valued at at least $250. Former N.Y. Judiciary Law §596(3).

In outline, the procedure in New York County is as follows: The county clerk* makes a list of persons "suitable to serve as grand jurors"; from this list the "county jury board,"** meeting annually, selects an "annual grand jury list"; from the "annual grand jury list," grand jurors are "drawn" by the county clerk, "under the supervisions of" a judge designated by the appellate division (N.Y. Judiciary Law §609). Section 592 of the N.Y. Judiciary Law provides:

> "The justices of the appellate division of the supreme court in the first and second judicial departments, or a majority of such justices, acting jointly shall adopt and may from time to time amend and rescind rules not inconsistent with statute, to regulate the time, manner and practice of examining, selecting, drawing, summoning and empaneling jurors, and the number of each to be selected, drawn and empaneled in and for the several courts within the counties of a city having a population of one million or more, and in addition to regulate in any other respects the duties enjoined by law on the county clerks and on the county jury boards in such counties with respect to the administration of the jury system."

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* The County Clerk of New York County is required, annually, to make a special investigation of persons qualified to serve as trial jurors, the trial jurors having been found through voting registration lists. H 35; N.Y. Judiciary Law §594; *see Gorin* v. *United States*, 313 F. 2d 641, 643-4 (1st Cir. 1963), *cert. denied*, 374 U.S. 829 (1963). Each applicant for grand jury service must be fingerprinted, and, if he has been convicted of a misdemeanor not involving moral turpitude, that fact must be shown on the list. N.Y. Judiciary Law §609.

** The county jury board consists of four persons; its chairman is the Presiding Justice of the Appellate Division (or his designee from the Appellate Division bench); its secretary is the county clerk, who is appointed by, and subject to removal by, the Appellate Division (Constitution, Article 13, Section 13); its two other members are Supreme Court justices, designated by the Appellate Division; and two comprise a quorum [N. Y. Judiciary Law §§591 and 609].

The New York Judicial Council, in its Sixth Annual Report (1940), at p. 201, explained this provision as follows:

> "The section, which represents a major change in the method of administering the jury system, was suggested by the Grand Jury Association of New York County. The form of the section derives from section 749-aa of the Judiciary Law concerning the making of rules governing special jurors.
>
> "It is believed that, while statutes should contain important matters, mere details of administration should be governed by rules which can be conveniently changed instead of by rigid statutory provisions."

Accordingly, as the Judicial Council likewise explained:

> "Details of administration have been taken out of statutory provisions and incorporated into rules so that they may be conveniently modified from time to time as changing circumstances dictate." *Id.* at 196.

With the enactment of the proposed statutory scheme, the Appellate Divisions of the First and Second Departments promulgated, without any noticeable change, the rules proposed by the Judicial Council (*see id.*, at pp. 214-230).

Although Section 592 of the Judiciary Law accorded the appellate division ample power to promulgate rules regulating the initial phases of the selection of jurors (including grand, special and sheriff's jurors), no such rules have been promulgated. From their 1940 inception, the "Rules of the Jury System in the City of New York" ("Rule 21") have referred to statutory law (Section 609 of the Judiciary Law) for authority regarding the "manner" in which, "[a]nnually," "there shall be selected the names of * * * grand jurors."

The New York scheme places great reliance upon the screening efficacy of the "personal interview." Section 593 of the Judiciary Law states that the county clerk's office *shall* "make personal examination of individuals concerning their eligibility" for jury service and Section 595 of the Judiciary Law mandates that "[n]o person's name shall be entered on a jury list unless * * * he has been personally interviewed by the county clerk," and has sworn to his "qualifications" on the prescribed questionnaire (for which Jury Rule 17 provides the form), and has had his name checked with the police department, and, further, "in the case of grand jurors" (who must be fingerprinted), has also been certified by the Bureau of Criminal Identification. Jury Rule 2 recites that "[u]pon the basis of the questionnaire, the personal interview and the check against the police records, the county clerk shall decide whether the person interviewed is qualified to serve as a juror." The rule further provides that "if disqualified, not qualified or granted exemption, the reason shall be noted." For this purpose, however, it shall suffice to place upon the questionnaire, a two-digit notation, such as R-1, R-2, etc., E-1, E-2, etc., or D-1, D-2, etc., thus indicating the particular subdivision of Sections 596, 599 or 598 of the Judiciary Law under which the person has been rejected, exempted, or disqualified. Thus, if, after a "personal interview," one of the county clerk's deputies should decide that a person is not "intelligent," "of sound mind and good character," or "well informed," the record of this determination would consist solely in the notation "R-5" on the person's questionnaire. According to Section 593 of the Judiciary Law, the questionnaires "shall be considered confidential and shall not be disclosed except as permitted by the appellate divisions." A denial of such permission by an appellate

division is not appealable to the Court of Appeals. *People* v. *Shakur,* 25 N Y 2d 705 (1969). The New York Civil Rights Law (Section 13) proclaims that no citizen "possessing all other qualifications * * * shall be disqualified to serve as a grand or petit juror in any court of this state on account of race, creed, color, national origin or sex, and any person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for any of the causes aforesaid" commits a misdemeanor. And the New York Judiciary Law (Section 593) says that the county clerk shall "take any steps necessary to bring about the punishment of those who violate the laws and rules relating to the drawing, selection, summoning and empaneling of jurors." A person may not serve as a grand juror more often than once every year. N.Y. Judiciary Law §601.

At the outset, it should be noted that the constitutionality of jury qualification statutes similar to New York's* were recently upheld by this Court in *Carter* v. *Greene County,* 396 U.S. 320, 331 (1970) and *Turner* v. *Fouche,* 396 U.S. 346, 354 (1970). In *Carter,* the statute required that the grand jurors were to be selected from those persons "generally reputed to be honest and intelligent and * * * esteemed in the community for their integrity, good character and sound judgment * * *" In *Turner,* grand jurors were required to be "upright" and "intelligent."

Claims similar to the petitioners' have previously been raised against grand juries in New York State and have consistently been rejected by the New York Court of Ap-

* "Intelligent; of sound mind and good character; well informed" [N. Y. Judiciary Law §596(5)] and "suitable" [N. Y. Judiciary Law §609].

peals. *People* v. *Ferguson*, 25 N Y 2d 728 (1969), *citing* *People* v. *Ferguson*, 55 Misc 2d 711 (SHAPIRO, J.) (Sup. Ct., Queens Cty. 1968); *People* v. *Horton*, 18 N Y 2d 355 (1966), *cert. denied*, 387 U. S. 934 (1967); *People* v. *Agron*, 10 N Y 2d 130 (1961), *cert. denied*, 368 U.S. 922 (1961); *People* v. *Dessaure*, 299 N.Y. 126 (1949), *cert. denied*, 337 U.S. 949 (1949). The claim here was unanimously rejected by the New York Court of Appeals. *People* v. *Chestnut*, 26 N Y 2d 481 (1970). Moreover, federal grand and petit jury systems have withstood similar attacks upon the ground that any disproportion of certain groups was not purposeful or intentional and hence not constitutionally offensive. *See United States* v. *Bennett*, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1962), *rehearing denied*, 396 U.S. 949 (1969); *United States* v. *Leonetti*, 291 F. Supp. 461 (S.D.N.Y. 1968); *United States* v. *Bowe*, 360 F.2d 1, 6-7 (2d Cir. 1966), *cert. denied*, 385 U.S. 961 (1966); *United States* v. *Greenberg*, 200 F. Supp. 382 (S.D.N.Y. 1961); *United States* v. *Van Allen*, 208 F. Supp. 331 (S.D.N.Y. 1962), *modified sub nom. United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *United States* v. *Flynn*, 216 F.2d 354, 378-89 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1955).

Any Disproportionate Representation of Negroes, Puerto Ricans, Blue-Collar Workers and Low Income Groups Was Not Purposeful or Intentional.

Negroes and Puerto Ricans

The petitioners contend that because certain groups, such as Negroes and Puerto Ricans, were not proportionately represented on the grand jury, it was unconstitutionally selected. However, they provide no tenable proof

that the disproportionate representation was equivalent to systematic, intentional discrimination. Rather they concentrate on citing statistics which do nothing more than repeat that imbalance exists. The petitioners claim that these statistics are, in themselves, proof of discrimination, citing as authority a series of cases that are found, after close examination, to concern only instances of obviously discriminatory practices on the part of jury officials—not mere statistical imbalances. *See Rabinowitz* v. *United States,* 366 F.2d 34 (5th Cir. 1966). At the hearing in the instant case, there was affirmative evidence that neither systematic nor intentional discrimination was directed against any person or group based upon race, color, creed or national origin (H227, 266-7, 294, 476). Neither the state courts nor the courts below found any showing of purposeful or intentional discrimination against any racial or ethnic group. The finding of fact at the close of the hearing in the state court, that any lack of proportional representation in the grand jury was not deliberate or intentional, was affirmed in the state appellate courts, is supported by the evidence in the record and was, therefore, binding on the courts below. See 28 U.S.C. §2254(d); *United States ex rel. Fein* v. *Deegan,* 410 F.2d 13 (2d Cir. 1969), *cert. denied,* 395 U.S. 935 (1969); *Maxwell* v. *Turner,* 411 F.2d 805 (10th Cir. 1969).

A jury venire need not "accurately reflect the proportionate strength of every identifiable group." *Swain* v. *Alabama,* 380 U.S. 202, 208 (1965). Since the New York County system is strictly voluntary (H49, 51, 56, 60-1, 109, 136, 181, 258, 262, 491), representation that is not a replica of the community is readily understandable and cannot be

considered intentional. *Fay* v. *New York,* 332 U.S. 261, 277-8 (1947), *aff'g* 296 N.Y. 510 (1946); *Hoyt* v. *Florida,* 368 U.S. 57 (1961); *see Brown* v. *Allen,* 344 U.S. 443 (1953). Indeed, grand jury service does not entail the same inconvenience for all elements of the community. Moreover, as was testified by a sociologist called as a witness by the defendants, persons on the way "up the economic ladder" tend to "become more active in public life" as they "enjoy greater prosperity" (H362-3). Good faith efforts have been made to encourage greater participation from these groups (H181-9; *see also* H137-8, 211-13, 255-6, 258, 260, 319-20).

Thus, the petitioners' argument that disproportion, without more, is sufficient to render a voluntary system unconstitutional, is without merit. This Court has held that where, for example, tax rolls are used as the source for jurors, the inevitably consequent racial imbalance in representation will not render such a system unconstitutionally exclusionary. *Brown* v. *Allen,* 344 U.S. 443 (1953). Likewise, selection of a jury from volunteers does not establish impermissible exclusion of a class, even assuming that fewer persons from a certain class volunteer. *Fay* v. *New York,* 332 U.S. 261, 277-8 (1947), *aff'g* 296 N.Y. 510 (1946); *Hoyt* v. *Florida,* 368 U.S. 57, 61 (1961). In fact, the New York Legislature suggested a voluntary procedure by terming a prospective grand juror, but not petit juror, an "applicant" (N.Y. Jud. Law §609). As was stated by District Judge FRANKEL, the legislature "could rationally have concluded that volunteers for the solemn responsibilities of grand jurors would be more reliable, devoted and effective than compelled members." *United States ex rel. Epton* v.

Nenna, 318 F. Supp. 899, 903 (S.D.N.Y. 1970), *aff'd*, —— F.2d —— (2d Cir. June 30, 1971).

And the assumption by the petitioners that volunteers on the grand jury will be more likely to indict than non-volunteers (Petition, pp. 21-2) has absolutely no support in the record. To the contrary, Circuit Judge KAUFMAN, writing for the unanimous court below, found "rational" the "conclusion of New York County officials that volunteer grand jurors would perform their obligations—*including the duty to refuse an indictment in appropriate cases* —more conscientiously than jurors suffering the considerable inconvenience of jury service pursuant to a compulsory summons." (Petition, pp. 9a-10a; emphasis added).

The essence of the petitioners' claim is that there is a constitutional right to be compelled to exercise one's constitutional rights. Such a position is untenable. Patently, the adequate remedy for a group assertedly wronged by a voluntary system would be to volunteer themselves for grand jury service. After all, if statistical analysis disclosed some comparable "imbalance" in the voting lists, could one be heard to complain that persons failing to avail themselves of ample opportunity to register had thereby been deprived of their right to vote?

Blue-collar workers and low income groups

Petitioners also complain of the statistical imbalance of blue-collar workers and persons with low incomes. It is not sufficient to sustain a challenge to the legality of a jury panel to show only that a particular group of persons, such as those with a low annual income, are not proportionately

represented. The test of validity is whether there was a systematic attempt to exclude a particular economic group that was eligible for jury service. *People* v. *Donohue,* 20 N Y 2d 824 (1967); *McManaman* v. *United States,* 327 F.2d 21 (10th Cir. 1964), *cert. denied,* 377 U.S. 945 (1964). Here, a person's employment was not considered in determining his eligibility as a grand juror (H253). As noted by the court below, the underrepresentation of blue-collar workers was "similar, in origin and justification, to the relative paucity of black grand jurors." (Petition, p. 13a).

In *United States* v. *Flynn,* 216 F.2d 354, 378-89 (2d Cir. 1954), *cert. denied,* 348 U.S. 909 (1955), the Court of Appeals stated that a higher proportion of petit jurors from affluent classes than manual workers did not evidence discrimination, since hardship from service falls more heavily upon manual laborers and they are therefore excused more readily.

Standards not explicitly contained in the statute have been upheld in the federal courts. The claim was made that a much larger percentage of manual workers than other persons were rejected at the questionnaire stage for "non-statutory" reasons. These reasons included financial hardship, appearance and manner, misspellings and incompleted questionnaires. The Second Circuit Court of Appeals said [*United States* v. *Flynn, supra* at 388]:

> "[W]e cannot say that the so-called 'non-statutory' grounds for elimination were either improper *qua* standards or discriminatorily applied."

Similarly, in *United States* v. *Hunt,* 265 F.Supp. 178, 183 (W.D. Tex. 1967), *aff'd,* 400 F.2d 306 (5th Cir. 1968), *cert.*

denied, 393 U. S. 1021 (1969), a letter soliciting suggestions for prospective jurors stated that "[i]n addition to the statutory qualification, please bear in mind that a prospective juror should be esteemed in his community as a person of good character, approved integrity, sound judgment, and fair education." This procedure was not found to be unconstitutional. *See also United States* v. *Caci,* 401 F.2d 664, 671 (2d Cir. 1968), *cert. denied,* 394 U. S. 917 (1969). Of course, even assuming, for the sake of argument, a minimal departure by one clerk from the state legislative standards, this Court has held that "[s]uch misapplication cannot be shown to be invidious discrimination." *Beck* v. *Washington,* 369 U.S. 541, 554 (1962).

The Former Exclusion of Persons Under Thirty-five Years of Age and Persons Receiving Welfare Assistance Was a Valid Exercise of Discretion to Set Relevant Qualifications for Grand Jury Service.

At the hearing in the New York Supreme Court it was established that in addition to the explicit statutory standards of jury eligibility stated in §596 of the Judiciary Law, other criteria for selection were used. Among these were the requirements, since discontinued, that a grand juror be at least 35 years of age and that he not be receiving welfare.

Persons under thirty-five

As witnesses at the hearing explained, the reason for the exclusion of those under 35 from grand jury service in New York County was that a certain degree of maturity and experience was deemed a desirable qualification for service —sufficient prior experience as a petit juror, together with a record of faithful attendance in that connection, being

especially important. They pointed out that a person would have to be close to thirty-five before he had completed the desired two periods of service of a petit juror (H103, 127, 161, 293, 302, 311). Such a standard is reasonable, and in keeping with a statutory duty to secure persons competent to perform the grand juror's task.

A grand jury, although it functions without a judge, is charged with screening thousands of potential felony cases to see whether or not the defendant should stand trial. In New York County, the grand jury reviews some 6,000 cases annually. In evaluating these cases, the grand jury is supposed to find an indictment "when all the evidence before them, taken together, is such, as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury" (N.Y. Code Crim. Proc. §251). Thus, the grand jurors must know what the function of a petit juror is and what constitutes finding someone guilty beyond a reasonable doubt. By having first participated in two jury trials, the prospective grand jurors would know what these concepts mean and be able to apply them. In short, they would be "well-informed" [*see* N.Y. Judiciary Law §596 (5)] as to the functions of a petit juror and thus be able accurately to evaluate the cases that come before them. *People* v. *Chestnut*, 26 N Y 2d 481, 490-91 (1970). Of course, the fact that the prospective grand jurors are required to have had this prior experience in no way prejudices the defendant. Instead, it gives them an insight that would encourage them to reduce or dismiss a charge in an appropriate case. In the words of Circuit Judge KAUFMAN, "[j]urors over 35 may reasonably be expected to draw upon a greater fund of experience because of their pre-

vious service on petit juries and their maturity, than those under 35." (Petition, p. 10a.)

And, of course, even if the clerks were mistaken under state law—a situation not deemed crucial by the New York Court of Appeals—there was no invidious discrimination against younger people. *See King* v. *United States,* 346 F.2d 123, 124 (1st Cir. 1967) (non-deliberate exclusion of persons between 21 and 25 by using state lists did not invalidate proceedings). Experience was the issue. *See Beck* v. *Washington, supra.*

Welfare recipients

The practice, recently discontinued (H141) but apparently in effect at the time in question (H140-41, 207), of not considering persons on welfare rolls for grand or petit jury service, was justified on the ground that persons on relief could not simultaneously receive welfare payments and money from another government source (Budin H141). At least one clerk did not consider this as a basis for rejection (H316). At the hearing there was no challenge to the validity of the assumption behind the practice (H141), nor is there presently in the petitioner's brief. They merely assert without citation that the practice was unconstitutional. The record, however, provides no basis for supposing that the assumption accounting for the practice was not defensible. The witness may have been referring to provisions of the New York City Charter that prohibit persons on the public payroll from receiving compensation elsewhere (§§1115, 1117-8). In addition, §598 of the New York Judiciary Law, last paragraph, disqualifies all public officers and employees from grand jury service who receive

annual compensation from a governmental source in excess of one thousand dollars (H125, 301; Exh. 2). See *People* v. *Chestnut, supra* at 491. As District Judge FRANKEL pointed out, "[R]ational people could surely entertain the broad underlying premise that those dependent upon government for substantial income might be unsuitably conflicted if they served as jurors." *United States ex rel. Epton* v. *Nenna,* 318 F. Supp. 899, 904 (S.D.N.Y. 1970), *aff'd,* —— F.2d —— (2d Cir. June 30, 1971). They might, in Judge KAUFMAN's words, "be viewed as potentially too timid to disagree with the prosecuting attorney, an important spokesman of the state from which they receive substantial benefits." (Petition, p. 10a.)

Moreover, since almost 90% of the welfare recipients of New York City in 1963-1964 were either disabled, over 65, receiving medical assistance or mothers or children where there was no father in the home,* the court below doubted "whether this requirement had any perceptible effect upon the composition of the 1964 grand jury list * * *" (Petition, p. 14a). Grand jurors sit for one month at a time and investigations are sometimes continued for many months. Disabled and elderly persons and impoverished mothers with dependent children would not be able to make the trip to the court district of Manhattan regularly, if at all. Of course, no case appeared in the record where a welfare recipient had asked to serve as a grand juror and was refused. There were, moreover, unemployed persons on the grand jury (H315). And, as discussed above, standards not explicitly contained in the state statute are permissible by the federal constitution if, as here, they are reasonable.

* Source: Records of the Division of Statistics of the Bureau of Fiscal Affairs of the Department of Social Services, City of New York.

The $250 Property Requirement [Former New York Judiciary Law §596(3)] Was Not Applied to the Selection of the 1964 Grand Jury.

The petitioners' challenge to the constitutionality of the $250 property requirement has no basis in the record. The hearing testimony overwhelmingly showed that the subsection—repealed in 1967—had long been ignored on the theory that "practically the clothes on a person's back" were presently worth that much (H478-9); see also H38, 41, 96-7, 116, 143-4, 223, 294, 316-7, 488-9). *People* v. *Chestnut*, 26 N Y 2d 481, 487 (1970); *cf. Samuels* v. *Mackell*, 288 F. Supp. 348, 356 (S.D.N.Y. 1968) (FRIENDLY, J., for 3-judge court), *aff'd on other grounds*, 401 U.S. 66 (1971). The petitioners argue, however, that even if the practice was discontinued in 1960, it still infected the 1964 Grand Jury panel because of the small, approximately 10%, annual grand jury turnover. This point, in the words of Judge FRANKEL, "dwindles * * * to a speculative and attenuated proposition * * *." *United States ex rel. Epton* v. *Nenna*, 318 F.Supp. 899, 905 (S.D.N.Y. 1970), *aff'd*, —— F.2d —— (2d Cir. June 30, 1971). In Judge KAUFMAN's analysis, "[t]his imperfection in the selection system, if such it was, could surely be tolerated as *de minimis*." (Petition, p. 14a). The burden is on the petitioner to show that there was any resulting constitutional defect. Moreover, good faith efforts to improve a system should not be discounted by looking to past practices.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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